Supreme Court, U.S.
FILED

No. 02 907 NOV 7 - 2002

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2002

ALAN ROSS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA

vs. **1:89CR01007-MMP**
1:97CV8-MMP

ALAN ROSS,

Defendant.

_____/

SECOND REPORT AND RECOMMENDATION

The court remanded the *Richardson* claim for further briefing and a supplemental report and recommendation. Doc. 693. The government filed a supplemental brief, Doc. 697, and Defendant filed a reply. Doc. 702. Much of the undersigned's previous analysis of this claim has not been challenged. This report and recommendation, however, repeats those passages from the earlier recommendation so that the court has a complete report and recommendation.

Additionally, the defendant filed a motion to amend his §2255 motion to add a claim arising under *Apprendi v. New Jersey*, 530 U.S. __, 120 S.Ct. 2347, 147 L.Ed.2d 435 (2000). Doc. 696. Both parties have also filed notices of supplemental authority. Docs. 703 and 704.

The *Richardson* Claim

Defendant contends that his conviction of the continuing criminal enterprise (CCE) in violation of 21 U.S.C. §848, must be vacated due to *Richardson v. United States*, 526 U.S. 813,

119 S.Ct. 1707, 143 L.Ed.2d 435 (1999). The Court in *Richardson* concluded that jury "unanimity in respect to each individual violation is necessary." 119 S.Ct. at 1709.

The court did not instruct the jury that it had to be unanimous in its verdict as to each individual violation it found with respect to count I. Doc. 528, vol. 38, pp. 149, 138-39. The court instructed the jury that:

> A "continuing series of violations" means proof of at least three violations of the federal controlled substances law, and also requires a finding that those violations were connected together as a series of related or ongoing activities, as distinguished from isolated or disconnected acts. It is not necessary that an offense be charged in order for it to constitute part of a continuing series of violations.

Doc. 702, pp. 1-2.

Defendant preserved this issue at trial, doc. 420 (requested instruction 20) and on direct appeal. *United States v. Ross*, 33 F.3d 1507, 1525, n.32 (11th Cir. 1994), *cert. denied*, 515 U.S. 1132 (1995). Had defendant's conviction still been pending on direct appeal, the interpretation of §848 in *Richardson* would have applied. *E.g.*, *United States v. West*, 201 F.3d 1312 (11th Cir. 2000). Thus, defendant did not procedurally default as to his *Richardson* claim. Further, since *Richardson* is a change of law which was not available when defendant took his appeal, that he lost the claim on his direct appeal is not a bar to reconsideration of the claim via a §2255 motion. *Davis v. United States*, 417 U.S. 333, 342, 94 S.Ct. 2298, 2303, 41 L.Ed.2d 109 (1974).

New rules of criminal procedure are not applied on collateral review. *United States v. Brown*, 117 F.3d 471, 479

(11th Cir. 1997), relying on *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). But *Teague* does not apply when the Supreme Court "decides the meaning of a criminal statute enacted by Congress." *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610, 140 L.Ed.2d 828 (1998); *Brown*, 117 F.3d at 479, construing *Teague* and quoting *In re Blackshire*, 98 F.3d 1293, 1294 (11th Cir. 1996)("the Supreme Court does 'not express a new rule of constitutional law . . . [when] it merely interpret[s] a substantive criminal statute using rules of statutory construction'").

The few appellate cases that have considered the question have held that *Richardson* interpreted the substantive provisions of a criminal statute. Applying the *Bousley* loophole to *Teague*, those courts have held that *Richardson* should be applied retroactively on review of an otherwise timely §2255 motion.[1]

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[1] The government did not argue that the claim is premature under 28 U.S.C. §2255, first subparagraph (3). Doc. 686 p.7 (recognizing the exception where a new right is to be given retroactive application in collateral proceedings). There are conflicting opinions on this subject. *E.g.*, *United States v. Lloyd*, 188 F.3d 184, 188 and n.10 (3d Cir. 1999)(recognizing the problem and citing several cases reaching different results); *compare*, *United States v. Lopez*, ___F.3d___, No. 99-31282, 2000 WL 1715915 (5th Cir., Dec. 5, 2000)(holding that a first §2255 motion bringing a *Richardson* claim, which is otherwise beyond the first year from the date the conviction was final, is untimely because neither the Supreme Court itself nor the Fifth Circuit has yet made *Richardson* retroactive on collateral review). Since the government has not raised this issue, this court need not decide it. However, since the court must address subject matter jurisdiction *sua sponte* , the following is noted with regard to the court's jurisdiction. For the initial §2255 motion, the one year period begins in part from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable

Murr v. United States, 200 F.3d 895, 9[0]5-906 (6th Cir. 2000) and *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000)(both citing *Bousley*). These cases are clearly correct. *See also, Benevento v. United States*, 81 F.Supp.2d 490, 493 (S.D.N.Y. 2000). *Richardson*, therefore, should apply to cases on collateral review.

The lack of an instruction that the jury had to reach a unanimous decision as to three or more of the "violations" in the "continuing series" to convict under 21 U.S.C. §848 was error as later revealed by *Richardson*, but it is subject to harmless error analysis. *Murr*, 200 F.3d at 906; *Lanier*, 220 F.3d at 839; *United States v. Escobar-deJesus*, 187 F.3d 148, 161-162 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 1208 (2000); *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000); *United States v. Smith*, 223 F.3d 554, 567 (7th Cir. 2000), *pet. cert. filed* Nov. 15, 2000; *United States v. Jefferson*, 215 F.3d 820, 823 (8th Cir. 2000); *United States v. Long*, 190 F.3d 471, 476 n.3 (6th Cir. 1999), *cert. denied*, 120 U.S. 555 (1999); *Neder v. United States*, 527 U.S.

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to cases on collateral review. §2255, first subparagraph (3). This language is different from the provision for a second motion, which explicitly requires that the question of retroactivity be decided by the Supreme Court itself. *Compare, In re Joshua*, 224 F.3d 1281 (11th Cir. 2000). Moreover, the right was recognized in *Richardson*, the motion to amend in this case came within the one year following *Richardson*, and the claim has been made retroactively applicable to §2255 cases by *Murr* and *Lanier*. But even if retroactivity must be decided by this circuit or the Supreme Court under §2255, first subparagraph (3), this is a statute of limitations and not a jurisdictional bar. *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)(citations omitted); *Akins v. United States*, 204 F.3d 1086, 1089 (11th Cir. 2000)(quoting *Sandvik*). As such, it is unlikely that the first subparagraph (3) of §2255 is a statute which governs the *accrual* of a claim based upon which court has decided that it is to be retroactively applied on a post-conviction motion. Finally, at worst Defendant's *Richardson* claim here is only premature, not untimely.

1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(erroneous jury instruction omitting an element of the offense is subject to harmless error review).

"[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder*, 119 S.Ct. at 1837. The question is whether "[i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.*, 119 S.Ct. at 1838.

> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless.

Id.

"[A] court, in typical appellate fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.*, 119 S.Ct. at 1839. In sum, the court must first determine whether the element was "genuinely contested," and if it was, then the court must determine whether "there is evidence upon which a jury could have reached a contrary finding." *Brown*, 202 F.3d at 701; *United States v. Nealy*, ___F.3d___, No. 99-15211, 2000 WL 1670932 (11th Cir. Nov. 7, 2000)("we must affirm Defendant's sentence if the record does not contain evidence that could

rationally lead to a contrary finding with respect to [the element of] drug quantity."). If there was evidence upon which a rational jury could have found for defendant, the error is not harmless. *Brown*, 202 F.3d at 701 and n.19. The burden of proving harmless error is on the government. *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999)(on remand).

An element of a §848 offense is a continuing series of at least three violations. *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1408 (11th Cir. 1989), *cert. denied*, 494 U.S. 1032 (1990); *United States v. Brantley*, 733 F.2d 1429, 1436 (11th Cir. 1984); *United States v. Graziano*, 710 F.2d 691, 697 n.11 (11th Cir. 1983); *United States v. Phillips*, 664 F.2d 971, 1013 (5th Cir. 1981)(Unit B), *cert. denied*, 457 U.S. 1136 (1982). This circuit, as do at least eight others,[2] counts a controlled substance conspiracy conviction as a §848 predicate violation. *United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). An overt act in violation of the drug laws not charged in a separate count and thus, which does not result in a separate conviction, may also count as one of the predicate violations for a §848 charge. *Id.*

Consequently, the circuits also uniformly hold that if a defendant is charged and convicted of three or more subsidiary controlled substances offenses, and assuming that the evidence that the subsidiary charged offenses were related is not controverted, the error is harmless. *Escobar-deJesus*, 187 F.3d at 162; *Murr*, 200 F.3d at 906; *Long*, 190 F.3d at 476 n.3; *Smith*, 223 F.3d at 568. The jury *necessarily* convicted of at least three predicate offenses since they convicted of the three offenses charged and those count as predicate offenses. *Brown*, 202 F.3d at 700. *Cf., United States v. Miller*, 22 F.3d 1075, 1079 (11th Cir.

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[2] *United States v. Harris*, 959 F.2d 246, 307 and n.7 (D.C.Cir.), *cert. denied*, 506 U.S. 932 (1992).

1994)(no plain error in money laundering conviction, despite erroneous instruction, where the jury found the predicate federal offenses when it convicted of other charges in the indictment).

Here, however, Defendant was convicted of only two offenses which may be considered as predicates for count I. Defendant was convicted of count II, a conspiracy to import controlled substances, cocaine and marijuana, and count III, a conspiracy to possess with intent to distribute controlled substances, cocaine and marijuana. Doc. 431 (verdict); Doc. 10 (indictment). A third connected predicate offense is needed to find the error not harmless.

Defendant argues that because he cannot now argue that his convictions for counts II and III, when combined with the conviction for count I, violate double jeopardy, then those convictions cannot be considered for purposes of harmless error and a *Richardson* claim.[3] This is not persuasive. The potential infirmity of the convictions due to double jeopardy with count I does not erode the probative value of the convictions for harmless error analysis with respect to the *Richardson* claim. The harmless error question is whether it is beyond a reasonable doubt that the jury would have convicted Defendant on count I had it been instructed as *Richardson* now requires. That the jury reached unanimous verdicts as to counts II and III means that they found two of the requisite three continuing violations for count I. Further, that unanimous verdicts were reached as to counts II and II[I] has other probative value for the harmless error analysis.

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The court ruled that this double jeopardy claim, based upon *Rutledge v. United States*, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996)(which was decided on March 27, 1996), was not timely presented and cannot now be considered. Doc. 693, p.4.

The issue, then, is whether the government has shown beyond a reasonable doubt that the jury would have unanimously found at least one other continuing violation had it been properly instructed. The answer is not provided by the convictions of counts II and III standing alone. "To prove the conspiracy, the government was required to show an agreement by two or more persons to commit the substantive offense, [defendant's] knowledge of the agreement, and her voluntary joinder in the enterprise." *United States v. Stanley*, 24 F.3d 1314, 1319 (11th Cir. 1994). Commission of a substantive drug offense, therefore, is not an element of a drug conspiracy,[4] and the court so instructed: "Now as to Counts two and Three, you will note that the defendant is not charged in those counts with actually violating Title 21, United States Code, sections 952 and 841. Rather, he is charged with having conspired to do so, in violation of title 21, United States Code, Sections 963 and 846." Doc. 528, vol. 38, p.137. As a consequence, it cannot be said that the two convictions on counts II and III necessarily supplied a unanimous verdict as to some third violation of the controlled substances laws. Therefore, the court must look to the record.

The *Brown* case from the Fourth Circuit is still the only *Richardson* case like the case at bar.[5] In *Brown*, the defendant

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[4] Thus, while an indictment must charge agreement to commit the substantive offense as an element of the conspiracy, the substantive offense so alleged is not a substantive offense for purposes of the Speedy Trial Act. *United States v. Derose*, 74 F.3d 1177, 1183 (11th Cir. 1996).

[5] In *Lanier*, the court found the error to be harmless because the defendant had conceded that he "bought and sold marijuana, and he did it for a number of years." 220 F.3d at 839. The court also found that the forfeiture verdict had established unanimity as to four continuing drug offenses. *Id.*, at 840. *Lanier* is not helpful to this stage

was convicted of a CCE charge, one count of a conspiracy to violate the drug laws, and four counts of money laundering. As in the case at bar, there was "voluminous testimony" and the Government did not specifically identify the CCE predicate offenses until closing argument. The *Brown* court, therefore, looked to the evidence submitted to support the offenses argued in closing argument. 202 F.3d at 701-702.

The court noted that defendant Brown had attempted to impeach each of the ten witnesses supporting each of the offenses argued in closing. *Id.*, at 702. Each witness had a substantial criminal record which defendant exposed to the jury on cross examination. *Id.* The court also noted that the credibility of five of the witnesses had been impeached in other ways. Witness Bynum had contradicted himself and was unsure as to the connection of defendant to one drug transaction. *Id.*, at 702. Lark could not remember specific details of the predicate violations. Adams and Sloan were impeached by prior inconsistent statements. Morrow could not remember her own criminal record and said she dealt drugs with defendant Brown when he was incarcerated. *Id.* The *Brown* court concluded:

> Brown thus genuinely contested the evidence supporting each of the alleged predicate offenses, and there was a basis in the record for the jury to have rationally disbelieved the testimony of any of the government's witnesses. Put simply, the Government's case turned upon the credibility of witnesses whose vulnerabilities were exposed by Brown's lawyers, and we are unable to discern

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of the court's analysis, as defendant neither conceded that he committed controlled substances violations, nor was there a forfeiture charge with subsidiary allegations of specific controlled substances violations.

> which of these witnesses were actually believed and relied upon by the jury. Our uncertainty is amplified by the fact that the jury was not given an enumeration of the possible predicate offenses that could constitute the "continuing series." This factual setting leads us to conclude: (1) that omitting the *Richardson* instruction could have "permitt[ed the] jury to avoid discussion of the specific factual details of each violation," thus potentially covering-up "wide disagreement among the jurors about just what the defendant did, or did not, do"; and (2) that the jurors could have failed to focus upon specific factual details in the absence of a *Richardson* instruction, "simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." *Richardson*, 119 S.Ct. at 1711. As the Supreme Court has indicated, these are two of the uncertainties sought to be avoided by a *Richardson* instruction. In the absence of such an instruction, we run head-on into each of them in this case.

In this circuit, however, whether the defendant "contested" the omitted element "may be considered but is not the pivotal concern. Instead, what the evidence showed regarding [the omitted element] is the touchstone." *Neder* (on remand), 197 F.3d at 1129 (rejecting the argument that an error in failing to instruct on an element of an offense is harmless only if the element was both uncontested and the evidence was overwhelming). The court instead found that any error may be harmless if the evidence was overwhelming as to the omitted element of the offense. *Id.*

The review which followed in *Neder* on remand is not especially helpful here, however. The missing element in that

case was the "materiality" of false statements made relative to federal mail fraud, wire fraud, and bank fraud charges in violation of 18 U.S.C. §§1341, 1343, and 1344. The Supreme Court had held a false statement in this context is "material" if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed." 197 F.3d at 1128, *quoting* 119 S.Ct. at 1837. Review of that issue was rather simple since it was undisputed that ceratin statements were made. The court only had to look at the statement in the context of the transaction to determine if it was "material" to the transaction as a matter of law. Further, even in those instances where the defendant had presented evidence that the particular decision maker was not in fact influenced by the statement because the decision maker knew it to be false, that was not evidence that the statement was immaterial since, again as a matter of law, "a false statement can be material even if the decision maker did not actually rely on the statement." 197 F.3d at 1128, 1133. In other words, the court *Neder* on remand did not identify any evidence presented by the defendant Neder upon which a jury might rationally have found a particular statement to have been immaterial.

Defendant Ross has shown that he "contested the credibility of each of the witnesses who testified as to controlled substances offenses which he allegedly committed and which were highlighted by the government's final argument. Had the jury entertained a reasonable doubt as to the credibility of these witnesses, it would not have found that he committed any of the controlled substances offenses which they described. And were this court governed by the *Brown* decision, it is probable that the error would not be harmless.

But in this circuit, that Defendant contested the credibility of the witnesses is not the pivotal question. Instead, the court must look to "what the evidence showed regarding [the omitted element]." *Neder* (on remand), *supra*. The question

whether the record contains "evidence that could rationally lead to a contrary finding" with respect to the last predicate offense to sustain a conviction for count I. *Nealy, supra.*

The nature of the evidence presented by Defendant in his defense is important. Some of the evidence was to reveal inconsistencies in the witness's testimony as to specific factual details when compared to that witness's testimony or the testimony of other witnesses. *E.g.*, Raul and Roberto Aspuru, Arturo Caradoza, Thomas Pritchett, John Quitoni, and James Allardyce. Doc. 702, pp. 9-10, 13, 15, 17-18. It takes little imagination to imagine a potential case where a rational jury might have refused to find a specific uncharged violation where there were important inconsistencies in the testimony supportive of that specific offense.

But the challenge to the credibility of ten witnesses, Bert Gordon, Russell Brothers, Robert LeClerc, Robert Moore, David Sabio, Jean Marie Lemieux, Gaspar Sanchez, Gaetan LaFond, Jr., Gaetan La Fond, Sr., and possibly Richard Tavares, was *only* a general attack upon their credibility.[6] Doc. 702, pp. 8-17. In each case, Defendant showed that the witness may have had a general propensity to lie because of prior criminal convictions, prior criminal offenses, prior untruthful statements, or a desire to earn a substantial assistance motion or other leniency. This is important, because we know that the jury convicted of counts II and III, the conspiracy charges. This means that the jury did not have a reasonable doubt as to the general credibility of at least some of the witnesses presented by the Government, despite the fact that Defendant generally contested their credibility. It is true that the individual jurors might have disagreed as to whom among the witnesses presented by the Government was credible

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[6] Defendant also *generally* attacked the credibility of the first six witnesses.

enough to support unanimous verdicts as to counts II and III, but it is also inescapably true that the jurors reached unanimous agreement that some subset of witnesses, if not all, were generally credible despite evidence to the contrary.

Second, it is undisputed that with the exception of Alvaro Gaspar Sanchez, each of the witnesses testified as to three or more controlled substance offenses committed by Defendant, and hundreds of such offenses were in evidence. This was clearly a trial with overwhelming evidence. There is simply no likelihood at all that the convictions for conspiracy in counts II and III *only* reflect the unanimous agreement of the jury that Defendant had an agreement with others to commit controlled substances offenses without a unanimous finding that he committed at least one of the hundreds of uncharged offenses in evidence. After all, the jury was charged that they had to find three such offenses, not just one. Further, the likelihood that, if properly charged, one member of the jury would have had a reasonable doubt that Defendant did not commit even *one* of these uncharged controlled substances offenses, having found at least some of the witnesses credible enough to join the other jurors in a verdict of guilty of the general conspiracy offenses in counts II and III, is nil.

Finally, there was no contention at all by Defendant that the uncharged controlled substance offenses testified to by the witnesses were not in a series and related. Accordingly, the *Richardson* error was harmless beyond a reasonable doubt.

The Motion to Amend to Add an *Apprendi* Claim

As Defendant explains in his motion, unlike many other cases in this district, in this case the indictment charged the drug quantities. In counts II and III the indictment charged conspiracies to import into the United States and to possess with

intent to distribute 1000 kilograms or more of marijuana and 5 kilograms or more of cocaine. Doc. 696, p.1 (setting forth the allegations of the indictment).

Following this circuit's precedent at the time, the jury was not required to find drug quantities as elements of the offense. On May 13, 1992, the court charged the jury that while the indictment "makes reference to specific quantities of controlled substances, quantity is not an element of the offense charged. The amount or quantity of a controlled substance is only relevant to the sentencing in the event of a conviction." Doc. 696, p.2. Defendant was sentenced to life imprisonment after convictions on both counts.

Defendant seeks to amend his §2255 motion to add a claim arising under *Apprendi v. New Jersey*, 530 U.S. __, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Defendant's claim is that because the jury was not charged that they must find the drug quantities beyond a reasonable doubt, he may be sentenced to no more than 20 years of imprisonment on counts II and III.[7] Doc. 696, p.6. ¶7.

In *Apprendi*, the Court "confirm[ed] the opinion that we expressed in [*Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed. 311 (1999)]. Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-2363

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[7] Defendant does not allege that the indictment failed to charge an element of the offense, and cannot so claim, as the indictment here alleged the threshold drug quantities for a life sentence. Thus, the supplemental authority, *United States v. Tran*, Nos. 99-1278(L) and 99-1389, ___F.3d ___, 2000 WL 1701651 (2d Cir., Nov. 15, 2000), is inapposite.

(emphasis added).

There may be substantial problems with the timeliness of this new claim under the one year limitation of 28 U.S.C. §2255. The Supreme Court may eventually apply the *Apprendi* jury instruction claim retroactively to cases on collateral review, and when it does, Defendant will be permitted to bring the claim.[8] Rather than resolve theses questions now, however, it is easier and more efficient for the court to determine the motion by the application of procedural default rules.

Defendant did not raise this claim at trial or on direct appeal, and the claim is procedurally defaulted. The court therefore looks instead to whether Defendant can demonstrate cause and prejudice to excuse his procedural default, or whether he has shown actual innocence. *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610-12, 140 L.Ed.2d 828 (1998). The cause and prejudice test applies even though *Apprendi* was decided after Defendant's conviction became final. *See, Pitts v. Cook*, 923 F.2d 1568, 1571, n.5 (11th Cir. 1991)(rejecting the argument that claim there was so novel that the failure to raise it could not constitute procedural default). Instead, legal novelty can constitute cause only if "the legal basis for the claim was not reasonably available to petitioner's counsel." Id., at 571, *citing Reed v. Ross*, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984); *Bousley*, 523 U.S. at 622, 118 S.Ct. at 1611 (also citing *Reed*).

It cannot be said that the claim which was successful in

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Apprendi speaks to the elements of the offense. Accordingly, decisions which discuss *Teague* but fail to mention *Bousley*, including the cases cited by both parties in the notices of supplemental authority, do not appear to be reliable. If this is error, however, it is harmless because relief should not be granted for other reasons.

Apprendi was not reasonably available before then, such that counsel for Defendant "lacked the tools" to construct it. 923 F.2d at 1572 (citation omitted). This is so because, as previously noted, in *Apprendi* the Court confirmed what it had expressed in *Jones*, 120 S.Ct. at 2362-2363. *Jones* had set forth the constitutional principle in dicta, to support the Court's interpretation of a statute that certain provisions were elements rather than sentencing factors, because otherwise "the statute would be open to constitutional doubt *in light of a series of cases over the past quarter century*, dealing with due process and the guarantee of trial by jury." 526 U.S. at240, 119 S.Ct. at 1222 (emphasis added). The discussion of those cases in *Jones* reveals that the tools for *making* the claim ultimately successful in *Apprendi* were available well before Defendant's conviction in this case. That the claim had been rejected in this circuit both before and after *Jones*[9] (as well as almost all of the others) does not constitute cause for default. *Bousley*, 523 U.S. at 623, 118 S.Ct. 1611 (" futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'")(citation omitted).

Ineffective assistance of counsel may constitute cause for a procedural default, of course. But the fact that a claim is newly clarified or articulated by the Supreme Court, yet not so novel that novelty itself is cause for the default, does not mean that counsel was unreasonable for failing to raise it. *Pitts*, 923 F.2d at 1571-1573. "[T]here will often be a 'gap' between the spheres

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[9] *See, United States v. Hester*, 199 F.3d 1287, 1290-92 (11th Cir. 2000), *vacated and remanded in light of Apprendi*, 121 S.Ct. 336 (Oct. 16, 2000) and *overruled* (due to *Apprendi*) in *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000). In *Hester* the court noted that before *Jones* it had "clearly rejected the characterization of the amount of drugs as an element of the offense under §841," and found that *Jones* did not require a contrary result. *Id.* (citations omitted).

of novelty and ineffective assistance of counsel," *id.* at 1573-1574 (citations omitted), and counsel's failure to raise an *Apprendi* claim prior to *Apprendi* and *Jones* is not ineffective assistance of counsel in the constitutional sense. This is especially true where the claim was not supported by circuit precedent. *Cf.*, *Williamson v. Moore*, 221 F.3d 1177, 1180 (11th Cir. 2000)(finding that a reasonable attorney would not have pursued a self defense theory for a number of reasons, one of which was that "in trial counsel's experience, self-defense arguments did not have a high rate of success in that jurisdiction.").

In summary, it was not attorney error for Defendant's trial lawyer to fail to make the *Apprendi* claim. Further, there was no impediment to the making of the claim. For these reasons, cause for default has not been shown.

Thus, the only way Defendant can successfully bring an *Apprendi* claim now is by showing that he is actually innocent with respect to the life sentences. Defendant has not attempted to make such a showing. The court is familiar with the trial evidence, and it is plain that there was a significant amount of evidence that Defendant's involvement with the two conspiracies was an involvement with more than 1,000 kilograms of marijuana and more than 5 kilograms of cocaine.

Thus, amendment to bring an *Apprendi* claim would be futile. Amendment need not be allowed where it would be futile to add new claims.

> Among the reasons that the Supreme Court has recognized as warranting the denial of a motion to amend is "futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). "A proposed amendment is futile if the complaint, as amended, would be

subject to dismissal." *Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999).

Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 777 n.10 (11th Cir. 2000). Since amendment would be futile, the court should exercise it discretion and deny the motion to amend.

For these reasons, it is **RECOMMENDED** that the court **DENY** the third motion to amend the §2255 motion, doc. 696, and **DENY WITH PREJUDICE** Defendant's final §2255 claim, the *Richardson* claim.

IN CHAMBERS at Tallahassee, Florida, this 28th day of December, 2000.

WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 30 days after being served with a copy of this report and recommendation, and the normal time for objections is extended accordingly. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

vs. **CASE NO. 1:89cr01007 MMP**
1:97 cv8 MMP

ALAN ROSS,

Defendant

_____/

ORDER

This case comes before the Court for consideration of the Magistrate Judge's Report and Recommendation (Doc. 705) dated December 28, 2000. The parties have been furnished a copy of the Report and Recommendation (Doc. 705) and have been afforded an opportunity to file objections. Pursuant to Title 28, United States Code, Section 636(b)(1), the Court has made a de novo determination of any portions to which objections have been made.

Having considered the report and recommendation and all objections timely filed, the Court determines that the report and recommendation should be adopted. The government filed a Response to the Second Report and Recommendation (Doc. 706) in which the government provides the following: (1) that a claim brought pursuant to *Richardson v. United States*, 526 U.S.

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813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) does not apply in this case because the Supreme Court and the Eleventh Circuit Court of Appeals have not recognized the retroactive application of *Richardson* pursuant to 28 U.S.C. §2255(3); (2) that the Sixth Circuit has ruled that *Richardson* does have retroactive application pursuant to 28 U.S.C. §2255(3), *see Murr v. United States*, 200 F.3d 895 (6th Cir. 2000); that the Sixth Circuit decided *Murr* incorrectly; and (4) that defendant's *Richardson* claim should be deemed "untimely" and "premature."

The Court acknowledges that the Eleventh Circuit has not yet issued an opinion explicitly stating that *Richardson* is retroactively applicable to cases on collateral review. However, such an explicit statement is not required because the Supreme Court in *Richardson* interpreted and clarified the meaning of a substantive criminal statute enacted by Congress. When the Supreme Court issues a new constitutional rule of criminal procedure, then an explicit statement of whether the new rule applies retroactively on collateral review is required, pursuant to 28 U.S.C. §2255(3).

The Sixth and Seventh Circuits have held that *Richardson* involves the substantive construction of a criminal statute, 21 U.S.C. §848(c), and that pursuant to *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 1610, 140 L.Ed. 828 (1998), *Richardson* applies retroactively. *See Murr v. United States*, 200 F.3d 895, 905-906 (6th Cir. 2000); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000). In contrast, a new constitutional rule of criminal procedure is barred on collateral review. *See Teague v. Lane*, 489 U.S. 288, 305-09, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Nothing has been presented to the Court to demonstrate that the *Richardson* decision constitutes a new constitutional rule of criminal procedure instead of a substantive interpretation of an existing statutory provision. *Teague* is inapplicable when the Supreme Court decides the meaning of a criminal statute enacted by Congress as

occurred in *Richardson*. *See Bousley*, 523 U.S. at 615.

Regarding the choice of terms, the Court notes that the *Richardson* claim in this case is not "premature" because *Richardson* interprets a substantive criminal statute and, therefore, is applied retroactively. Additionally, the *Richardson* claim is not "untimely." *Richardson* was decided on June 1, 1999. *See Richardson* 526 U.S. at 823, 119 S.Ct. at 1707. Defendant filed his motion to amend his §2255 motion (Doc. 680) on September 20, 1999, well within the one-year statute of limitations provided by §2255(3).

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. The Magistrate Judge's Report and Recommendation (Doc. 705) is **ADOPTED** and incorporated by reference in this order.

2. Defendant's third motion to amend §2255 motion (Doc. 696) is **DENIED**.

3. Defendant's final §2255 claim, the *Richardson* claim, is **DENIED WITH PREJUDICE**.

DONE AND ORDERED this 26th day of January, 2001.

MAURICE M. PAUL, SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

vs. **CASE NO. 1:89cr01007 MMP**
1:97 cv8 MMP

ALAN ROSS,

Defendant

_____/

ORDER

Before the Court is Defendant's Motion to vacate the Order of January 26, 2001, or Alternatively, to Reconsider Order Based on Defendant's Objections (Doc. 710). The Court notes that it prematurely adopted the Magistrate Judge's Report and Recommendation. Pursuant to 28 U.S.C. §636(b)(1), the Court will conduct a de novo review based upon the Defendant's Objections (Doc. 709).

Defendant raises the following two claims in his Objections (Doc. 709): (1) that the Magistrate Judge improperly applied harmless error analysis to Defendant's *Richardson* claim; and (2) that Defendant should be permitted to amend his §2255 motion to include an *Apprendi* claim. Addressing the second issue, Defendant has no *Apprendi* claim because the Supreme Court has not held that *Apprendi* applies retroactively on collateral review. *See In Re Joshua*, 224 F.3d 1281, 1283 (11th

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Cir. 2000). The Supreme Court has only allowed *Apprendi* claims on direct appeal. *See id.*

At trial, the Court failed to instruct the jury that its verdict had to be unanimous as to three violations for Count I, a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. §848. *See Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). An element of a §848 offense is a continuing series of at least three violations. *See United States v. Alvarez-Moreno*, 874 F.2d 1402, 1408 (11th Cir. 1989), *cert. denied*, 494 U.S. 1032 (1990). A controlled substance conspiracy conviction qualifies as a §848 predicate violation. *See United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987). Additionally, an overt act that violates the drug laws, but that is not charged in a separate count, also qualifies as one of the predicate violations for a §848 charge. *See id.* Defendant was convicted of Count II, conspiracy to import controlled substances, and Defendant was convicted of Count III, conspiracy to possess with intent to distribute controlled substances. Therefore, defendant was convicted of two offenses that qualify as predicate violations for Count I.

Thus, the only remaining issue to be resolved is whether the Government has shown beyond a reasonable doubt that the jury would have unanimously found at least one other continuing violation from the evidence presented, which included nine witnesses that testified regarding three or more controlled substance offenses committed by Defendant, and hundreds of such offenses that were placed in evidence. The Magistrate Judge properly applied the harmless error analysis as provided by the Eleventh Circuit in *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999). In *Neder*, the Eleventh Circuit provides that the correct harmless error analysis is whether the jury verdict would have been the same absent the error or whether the record contains evidence that could rationally lead to a contrary finding. *See id.* As stated above, ample evidence was introduced to

demonstrate that Defendant committed the uncharged controlled substance offenses. The record in this case did not contain "evidence that could rationally lead to a contrary finding" by the jury with respect to the last predicate offense to sustain a conviction for Count I. *See id.* This was not a case in which the jury simply concluded "that where there is smoke there must be fire." *See Richardson*, 526 U.S. at 819. Additionally, it defies logic that a rational jury could find Defendant unanimously guilty of the conspiracies charged in Counts I and II without a unanimous finding that Defendant committed at least one of the hundreds of controlled substance offenses in evidence. Further, defendant did not contest that the uncharged controlled substance offenses testified to by the witnesses were not in a series and related. Thus, the *Richardson* error was harmless beyond a reasonable doubt.

Defendant asserts that the harmless error analysis in *United States v. Brown*, 202 F.3d 691 (4th Cir. 2000) should apply. Even following the harmless error analysis set forth in *Brown*, defendant fails to genuinely contest the evidence. The defendant in *Brown* was able to impeach five key witnesses through the witnesses' contradictory testimony, alleged lack of memory regarding critical events, and prior inconsistent statements. *See id.* at 702. The defendant in *Brown* was able to genuinely contest the evidence supporting each of the alleged predicate offenses. *See id.* In the case at hand, Defendant did challenge the credibility of ten witnesses. *See* Defendant's Response to Government's Supplemental Brief (Doc. 702), at 8-17. However, defendant's challenge was only a *general attack* on the witnesses' credibility that showed the witnesses may have had a general propensity to lie because of prior criminal convictions and prior untruthful statements. Defendant, unlike in *Brown*, was not able to actually impeach the witnesses. Instead, the jury found these witnesses credible, which led to Defendant's conviction on Counts II and III, the conspiracy charges. To reiterate, nine witnesses testified as to three or more controlled

substance offenses committed by Defendant, and hundreds of such offenses were placed in evidence. This was a trial with overwhelming evidence, and the closing arguments indicate that both sides viewed the verdict as an all or nothing issue. Either the jury would perceive cooperating witnesses as liars and acquit Defendant, or the jury would accept the cooperating witnesses' testimony and convict Defendant. The latter occurred. If properly charged, the jury, in light of the overwhelming evidence, would not have reached a different conclusion.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Defendant's Motion to Vacate or, Alternatively, Motion for Reconsideration (Doc. 710) is **DENIED**.

2. The Court's Order of January 26, 2001 (Doc. 707)(adopting the Magistrate Judge's Report and Recommendation) is **INCORPORATED** by reference in this Order.

DONE AND ORDERED this 23rd day of February, 2001.

MAURICE M. PAUL,
SENIOR DISTRICT JUDGE